C

During pretrial proceedings in the armed robbery case, Thompson filed a motion requesting access to all materials and information "favorable to the defendant" and "material and relevant to the issue of guilt or punishment," as well as "any results or reports" of "scientific tests or experiments." *Id.*, at EX144, EX145. Prosecutorial responses to this motion fell far short of *Brady* compliance.[4]

First, prosecutors blocked defense counsel's inspection of the pant leg swatch stained by the robber's blood. Although Dubelier's April 3 response stated, "Inspection to be permitted," *id.*, at EX149, the swatch was signed out from the property room at 10:05 a.m. the next day, and was not returned until noon on April 10, the day before trial, *id.*, at EX43, EX670. Thompson's attorney inspected the evidence made available to him and found no blood evidence. No one told defense counsel about the swatch and its recent removal from the property room. *Id.*, at EX701–EX702; Tr. 400–402. But cf. *ante*, at 17, n. 11 (Thompson's attorney had "access to the evidence locker where the swatch was recorded as evidence.").[5]

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[4] Connick did not dispute that failure to disclose the swatch and the crime lab report violated *Brady*. See Tr. 46, 1095. But cf. *ante*, at 4, 6 (limiting Connick's concession, as Connick himself did not, to failure to disclose the crime lab report).

In JUSTICE SCALIA's contrary view, "[t]here was probably no *Brady* violation at all," or, if there was any violation of Thompson's rights, it "was surely on the very frontier of our *Brady* jurisprudence," such that "Connick could not possibly have been on notice" of the need to train. *Ante*, at 7. Connick's counsel, however, saw the matter differently. "[A]ny reasonable prosecutor would have recognized blood evidence as *Brady* material," he said, indeed "the proper response" was "obvious to all." Record 1663, 1665.

[5] The majority assails as "highly suspect" the suggestion that prosecutors violated *Brady* by failing to disclose the blood-stained swatch. See *ante*, at 17, n. 11. But the parties stipulated in Thompson's §1983 action, and the jury was so informed, that, "[p]rior to the armed robbery trial, Mr. Thompson and his attorneys were not advised of the existence

Second, Dubelier or Whittaker ordered the crime laboratory to rush a pretrial test of the swatch. Tr. 952–954. Whittaker received the lab report, addressed to his attention, two days before trial commenced. Immediately thereafter, he placed the lab report on Williams' desk. Record EX151, EX589. Although the lab report conclusively identified the perpetrator's blood type, *id.*, at EX151, the District Attorney's Office never revealed the report to the defense.[6]

Third, Deegan checked the swatch out of the property room on the morning of the first day of trial, but the prosecution did not produce the swatch at trial. *Id.*, at EX43. Deegan did not return the swatch to the property room after trial, and the swatch has never been found. Tr. of Oral Arg. 37.

"[B]ased solely on the descriptions" provided by the three victims, Record 683, the jury convicted Thompson of attempted armed robbery. The court sentenced him to 49.5 years without possibility of parole—the maximum available sentence.

D

Prosecutors continued to disregard *Brady* during the

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of the blood evidence, that the evidence had been tested, [or] that a blood type was determined definitively from the swatch . . . ." Tr. 46. Consistent with this stipulation, Thompson's trial counsel testified that he spoke to "[t]he clerk who maintain[ed] the evidence" and learned that "[t]hey didn't have any blood evidence." *Id.*, at 401. And the District Court instructed the jury, with no objection from Connick, "that the nonproduced blood evidence . . . violated [Thompson's] constitutional rights as a matter of law." *Id.*, at 1095.

[6]JUSTICE SCALIA questions petitioners' concession that *Brady* was violated when the prosecution failed to inform Thompson of the blood evidence. He considers the evidence outside *Brady* because the prosecution did not endeavor to test Thompson's blood, and therefore avoided knowing that the evidence was in fact exculpatory. *Ante*, at 6–7. Such a "don't ask, don't tell" view of a prosecutor's *Brady* obligations garners no support from precedent. See also *supra*, at 6, n. 4; *infra*, at 21, n. 13.

murder trial, held in May 1985, at which the prosecution's order-of-trial strategy achieved its aim.[7] By prosecuting Thompson for armed robbery first—and withholding blood evidence that might have exonerated Thompson of that charge—the District Attorney's Office disabled Thompson from testifying in his own defense at the murder trial.[8] As earlier observed, see *supra*, at 5, impeaching use of the prior conviction would have severely undermined Thompson's credibility. And because Thompson was effectively stopped from testifying in his own defense, the testimony of the witnesses against him gained force. The prosecution's failure to reveal evidence that could have impeached those witnesses helped to seal Thompson's fate.

First, the prosecution undermined Thompson's efforts to impeach Perkins. Perkins testified that he volunteered information to the police with no knowledge of reward money. Record EX366, EX372–EX373. Because prosecutors had not produced the audiotapes of Perkins' conversations with the Liuzza family (or a police summary of the tapes), Thompson's attorneys could do little to cast doubt on Perkins' credibility. In closing argument, the prosecution emphasized that Thompson presented no "direct evidence" that reward money had motivated any of the witnesses. *Id.*, at EX3171–EX3172.

Second, the prosecution impeded Thompson's impeachment of key witness Kevin Freeman. It did so by failing to disclose a police report containing Perkins' account of

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[7]During jury deliberations in the armed robbery case, Williams, the only Orleans Parish trial attorney common to the two prosecutions, told Thompson of his objective in no uncertain terms: "I'm going to fry you. You will die in the electric chair." Tr. 252–253.

[8]The Louisiana Court of Appeal concluded, and Connick does not dispute, that Thompson "would have testified in the absence of the attempted armed robbery conviction." *State* v. *Thompson*, 2002–0361, p. 7 (7/17/02), 825 So. 2d 552, 556. But cf. *ante*, at 1, 3 (Thompson "elected" not to testify).

what he had learned from Freeman about the murder. See *supra*, at 4. Freeman's trial testimony was materially inconsistent with that report. Tr. 382–384, 612–614; Record EX270–EX274. Lacking any knowledge of the police report, Thompson could not point to the inconsistencies.

Third, and most vital, the eyewitness' initial description of the assailant's hair, see *supra*, at 3, was of prime relevance, for it suggested that Freeman, not Thompson, murdered Liuzza, see *supra*, at 4. The materiality of the eyewitness' contemporaneous description of the murderer should have been altogether apparent to the prosecution. Failure to produce the police reports setting out what the eyewitness first said not only undermined efforts to impeach that witness and the police officer who initially interviewed him. The omission left defense counsel without knowledge that the prosecutors were restyling the killer's "close cut hair" into an "Afro."

Prosecutors finessed the discrepancy between the eyewitness' initial description and Thompson's appearance. They asked leading questions prompting the eyewitness to agree on the stand that the perpetrator's hair was "afro type," yet "straight back." Record EX322–EX323. Corroboratively, the police officer—after refreshing his recollection by reviewing material at the prosecution's table—gave artful testimony. He characterized the witness' initial description of the perpetrator's hair as "black and short, *afro style*." *Id.*, at EX265 (emphasis added). As prosecutors well knew, nothing in the withheld police reports, which described the murderer's hair simply as "close cut," portrayed a perpetrator with an Afro or Afro-style hair.

The jury found Thompson guilty of first-degree murder. Having prevented Thompson from testifying that Freeman was the killer, the prosecution delivered its ultimate argument. Because Thompson was already serving a

near-life sentence for attempted armed robbery, the prosecution urged, the only way to punish him for murder was to execute him. The strategy worked as planned; Thompson was sentenced to death.

E

Thompson discovered the prosecutors' misconduct through a serendipitous series of events. In 1994, nine years after Thompson's convictions, Deegan, the assistant prosecutor in the armed robbery trial, learned he was terminally ill. Soon thereafter, Deegan confessed to his friend Michael Riehlmann that he had suppressed blood evidence in the armed robbery case. *Id.*, at EX709. Deegan did not heed Riehlmann's counsel to reveal what he had done. For five years, Riehlmann, himself a former Orleans Parish prosecutor, kept Deegan's confession to himself. *Id.*, at EX712–EX713.

On April 16, 1999, the State of Louisiana scheduled Thompson's execution. *Id.*, at EX1366–EX1367. In an eleventh-hour effort to save his life, Thompson's attorneys hired a private investigator. Deep in the crime lab archives, the investigator unearthed a microfiche copy of the lab report identifying the robber's blood type. The copy showed that the report had been addressed to Whittaker. See *supra*, at 7. Thompson's attorneys contacted Whittaker, who informed Riehlmann that the lab report had been found. Riehlmann thereupon told Whittaker that Deegan "had failed to turn over stuff that might have been exculpatory." Tr. 718. Riehlmann prepared an affidavit describing Deegan's disclosure "that he had intentionally suppressed blood evidence in the armed robbery trial of John Thompson." Record EX583.

Thompson's lawyers presented to the trial court the crime lab report showing that the robber's blood type was B, and a report identifying Thompson's blood type as O. This evidence proved Thompson innocent of the robbery.

The court immediately stayed Thompson's execution, *id.*, at EX590, and commenced proceedings to assess the newly discovered evidence.

Connick sought an abbreviated hearing. A full hearing was unnecessary, he urged, because the Office had confessed error and had moved to dismiss the armed robbery charges. See, *e.g.*, *id.*, at EX617. The court insisted on a public hearing. Given "the history of this case," the court said, it "was not willing to accept the representations that [Connick] and [his] office made [in their motion to dismiss]." *id.*, at EX882. After a full day's hearing, the court vacated Thompson's attempted armed robbery conviction and dismissed the charges. Before doing so, the court admonished:

> "[A]ll day long there have been a number of young Assistant D. A.'s . . . sitting in this courtroom watching this, and I hope they take home . . . and take to heart the message that this kind of conduct cannot go on in this Parish if this Criminal Justice System is going to work." *Id.*, at EX883.

The District Attorney's Office then initiated grand jury proceedings against the prosecutors who had withheld the lab report. Connick terminated the grand jury after just one day. He maintained that the lab report would not be *Brady* material if prosecutors did not know Thompson's blood type. Tr. 986; cf. *supra*, at 7, n. 6. And he told the investigating prosecutor that the grand jury "w[ould] make [his] job more difficult." Tr. 978–979. In protest, that prosecutor tendered his resignation.

F

Thereafter, the Louisiana Court of Appeal reversed Thompson's murder conviction. *State* v. *Thompson*, 2002–0361, p. 10 (7/17/02), 825 So. 2d 552, 558. The unlawfully procured robbery conviction, the court held, had violated

Thompson's right to testify and thus fully present his defense in the murder trial. *Id.*, at 557. The merits of several *Brady* claims arising out of the murder trial, the court observed, had therefore become "moot." 825 So. 2d, at 555; see also Record 684.[9] But cf. *ante*, at 10–11, n. 7, 16–17, n. 11 (suggesting that there were no *Brady* violations in the murder prosecution because no court had adjudicated any violations).[10]

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[9]Thompson argued that "the State failed to produce police reports 'and other information' which would have identified 'eye- and ear-witnesses' whose testimony would have exonerated him and inculpated [Freeman], . . . and would have shown that [Perkins,] . . . who stated [he] heard [Thompson] admit to committing the murder[,] had been promised reward money for [his] testimony." *Thompson*, 825 So. 2d, at 555. In leaving these arguments unaddressed, the Louisiana Court of Appeal surely did not defer to the Fifth Circuit's earlier assessment of those claims, made on an anemic record, in *Thompson* v. *Cain*, 161 F. 3d 802. Nor did the Louisiana Court of Appeal suggest that Thompson was "belatedly tr[ying] to reverse" the Fifth Circuit's decision. But cf. *ante*, at 17, n. 11.

[10]The Court notes that in *Thompson* v. *Cain*, the Fifth Circuit rejected *Brady* claims raised by Thompson, characterizing one of those claims as "without merit." *Ante*, at 17, n. 11 (quoting *Thompson*, 161 F. 3d, at 807); see *supra*, at 4, n. 2. The Court, however, overlooks the date of that Fifth Circuit decision. It was rendered before revelation of the *Brady* violations in the armed robbery trial, before Thompson had the opportunity for discovery in his §1983 suit, and before Thompson or any court was aware of the "close cut hair" police reports. See *Thompson*, 161 F. 3d, at 812, n. 8. It is these later revelations, not the little Thompson knew in 1998, that should count. For example, the Fifth Circuit, in 1998, believed that Perkins' statement recorded in the police report did not "differ from Freeman's trial testimony." *Id.*, at 808. But evidence put before the jury in 2007 in the §1983 trial showed that the police report, in several material respects, was inconsistent with Freeman's trial testimony. Tr. 382–383.

Connick has never suggested to this Court that the jury in the §1983 trial was bound by the Fifth Circuit's 1998 *Brady* rulings. That court "afford[ed] great deference to" the state trial court's findings, made after a 1995 post-conviction relief hearing. *Thompson*, 161 F. 3d, at 805. The jury in the §1983 trial, of course, had far more extensive and accurate information on which to reach its decision. Moreover, as

Undeterred by his assistants' disregard of Thompson's rights, Connick retried him for the Liuzza murder. Thompson's defense was bolstered by evidence earlier unavailable to him: ten exhibits the prosecution had not disclosed when Thompson was first tried. The newly produced items included police reports describing the assailant in the murder case as having "close cut" hair, the police report recounting Perkins' meetings with the Liuzza family, see *supra*, at 3–4, audio recordings of those meetings, and a 35-page supplemental police report. After deliberating for only 35 minutes, the jury found Thompson not guilty.

On May 9, 2003, having served more than 18 years in prison for crimes he did not commit, Thompson was released.

II

On July 16, 2003, Thompson commenced a civil action under 42 U. S. C. §1983 alleging that Connick, other officials of the Orleans Parish District Attorney's Office, and the Office itself, had violated his constitutional rights by wrongfully withholding *Brady* evidence. Thompson sought to hold Connick and the District Attorney's Office liable for failure adequately to train prosecutors concerning their *Brady* obligations. Such liability attaches, I agree with the Court, only when the failure "amount[s] to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.'" *Ante*, at 9 (quoting *Canton* v. *Harris*, 489 U. S. 378, 388 (1989)). I disagree, however, with the Court's conclusion that

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earlier noted, the same trial court that made the 1995 findings was, in 1999, outraged by the subsequently discovered *Brady* violations and by Connick's reluctance to bring those violations to light. See *supra*, at 10–11. Certainly that judge would not have wanted the jury that assessed Connick's deliberate indifference in the §1983 trial to defer to findings he earlier made on a notably incomplete record.

Thompson failed to prove deliberate indifference.

Having weighed all the evidence, the jury in the §1983 case found for Thompson, concluding that the District Attorney's Office had been deliberately indifferent to Thompson's *Brady* rights and to the need for training and supervision to safeguard those rights. "Viewing the evidence in the light most favorable to [Thompson], as appropriate in light of the verdic[t] rendered by the jury," *Patrick* v. *Burget*, 486 U. S. 94, 98, n. 3 (1988), I see no cause to upset the District Court's determination, affirmed by the Fifth Circuit, that "ample evidence . . . adduced at trial" supported the jury's verdict. Record 1917.

Over 20 years ago, we observed that a municipality's failure to provide training may be so egregious that, even without notice of prior constitutional violations, the failure "could properly be characterized as 'deliberate indifference' to constitutional rights." *Canton*, 489 U. S., at 390, n. 10. "[I]n light of the duties assigned to specific officers or employees," *Canton* recognized, "it may happen that . . . the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers . . . can reasonably be said to have been deliberately indifferent to the need." *Id.*, at 390. Thompson presented convincing evidence to satisfy this standard.

A

Thompson's §1983 suit proceeded to a jury trial on two theories of liability: First, the Orleans Parish Office's official *Brady* policy was unconstitutional; and second, Connick was deliberately indifferent to an obvious need to train his prosecutors about their *Brady* obligations. Connick's *Brady* policy directed prosecutors to "turn over what was required by state and federal law, but no more." Brief for Petitioners 6–7. The jury thus understandably rejected Thompson's claim that the official policy itself was uncon-

stitutional. *Ante*, at 5.

The jury found, however, that Connick was deliberately indifferent to the need to train prosecutors about *Brady*'s command. On the special verdict form, the jury answered yes to the following question:

> "Was the *Brady* violation in the armed robbery case or any infringements of John Thompson's rights in the murder trial substantially caused by [Connick's] failure, through deliberate indifference, to establish policies and procedures to protect one accused of a crime from these constitutional violations?" Record 1585.

Consistent with the question put to the jury, and without objection, the court instructed the jurors: "[Y]ou are not limited to the nonproduced blood evidence and the resulting infringement of Mr. Thompson's right to testify at the murder trial. You may consider all of the evidence presented during this trial." Tr. 1099; Record 1620.[11] But

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[11]The court permitted Thompson to introduce evidence of other *Brady* violations, but because "the blood evidence alone proved the violation [of Thompson's constitutional rights]," the court declined specifically "to ask the jury [whether] this other stuff [was] also *Brady*." Tr. 1003. The court allowed Thompson to submit proof of other violations to "sho[w] the cumulative nature . . . and impact [of] evidence . . . as to . . . the training and deliberate indifference . . . ." *Ibid.* But cf. *ante*, at 17, n. 11 (questioning how "these violations are relevant" to this case). Far from indulging in my own factfindings, but cf. *ante*, at 16–17, n. 11, I simply recite the evidence supporting the jury's verdict in Thompson's §1983 trial.

The Court misleadingly states that "the District Court instructed the jury that the 'only issue' was whether the nondisclosure [of the crime lab report] was caused by either a policy, practice, or custom of the district attorney's office or a deliberately indifferent failure to train the office's prosecutors." *Ante*, at 4. The jury instruction the majority cites simply directed the jury that, with regard to the blood evidence, as a matter of law, Thompson's constitutional rights had been violated. Record 1614–1615. The court did not preclude the jury from assessing evidence of other infringements of Thompson's rights. *Id.*, at 1585; see *Kyles* v. *Whitley*, 514 U. S. 419, 421 (1995) ("[T]he state's obligation

cf. *ante*, at 2, 6, 10, n. 7, 16; *ante*, at 1 (SCALIA, J., concurring) (maintaining that the case involves a single *Brady* violation). That evidence included a stipulation that in his retrial for the Liuzza murder, Thompson had introduced ten exhibits containing relevant information withheld by the prosecution in 1985. See *supra*, at 13.

Abundant evidence supported the jury's finding that additional *Brady* training was obviously necessary to ensure that *Brady* violations would not occur: (1) Connick, the Office's sole policymaker, misunderstood *Brady*. (2) Other leaders in the Office, who bore direct responsibility for training less experienced prosecutors, were similarly uninformed about *Brady*. (3) Prosecutors in the Office received no *Brady* training. (4) The Office shirked its responsibility to keep prosecutors abreast of relevant legal developments concerning *Brady* requirements. As a result of these multiple shortfalls, it was hardly surprising that *Brady* violations in fact occurred, severely undermining the integrity of Thompson's trials.

1

Connick was the Office's sole policymaker, and his testimony exposed a flawed understanding of a prosecutor's *Brady* obligations. First, Connick admitted to the jury that his earlier understanding of *Brady*, conveyed in prior sworn testimony, had been too narrow. Tr. 181–182. Second, Connick confessed to having withheld a crime lab report "one time as a prosecutor and I got indicted by the U. S. Attorney over here for doing it." *Id.*, at 872. Third, even at trial Connick persisted in misstating *Brady*'s requirements. For example, Connick urged that there could be no *Brady* violation arising out of "the inadvertent conduct of [an] assistant under pressure with a lot of case

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under *Brady* . . . turns on the cumulative effect of all . . . evidence suppressed by the government . . . .").

load." Tr. 188–189. The court, however, correctly instructed the jury that, in determining whether there has been a *Brady* violation, the "good or bad faith of the prosecution does not matter." Tr. 1094–1095.

2

The testimony of other leaders in the District Attorney's Office revealed similar misunderstandings. Those misunderstandings, the jury could find, were in large part responsible for the gross disregard of *Brady* rights Thompson experienced. Dubelier admitted that he never reviewed police files, but simply relied on the police to flag any potential *Brady* information. Tr. 542. The court, however, instructed the jury that an individual prosecutor has a "duty . . . to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." *Id.*, at 1095; Record 1614. Williams was asked whether "*Brady* material includes documents in the possession of the district attorney that could be used to impeach a witness, to show that he's lying"; he responded simply, and mistakenly, "No." Tr. 381. The testimony of "high-ranking individuals in the Orleans Parish District Attorney's Office," Thompson's expert explained,[12] exposed "complete errors . . . as to what *Brady* required [prosecutors] to do." *Id.*, at 427, 434. "Dubelier had no understanding of his obligations under *Brady* whatsoever," *id.*, at 458, the expert observed, and Williams "is still not sure

[12]With no objection from petitioners, the court found Thompson's expert, Joseph Lawless, qualified to testify as an expert in criminal law and procedure. Tr. 419, 426. Lawless has practiced criminal law for 30 years; from 1976 to 1979, he was an assistant district attorney, and thereafter he entered private practice. *Id.*, at 412. He is the author of Prosecutorial Misconduct: Law, Procedure, Forms (4th ed. 2008), first published in 1985. Tr. 414. The text is used in a class on ethics and tactics for the criminal lawyer at Harvard Law School and in the federal defender training program of the Administrative Office of the United States Courts. *Id.*, at 416.

what his obligations were under *Brady*," *id.*, at 448. But cf. *ante*, at 4–5 ("[I]t was undisputed at trial that the prosecutors were familiar with the general *Brady* requirement that the State disclose to the defense evidence in its possession that is favorable to the accused.").

The jury could attribute the violations of Thompson's rights directly to prosecutors' misapprehension of *Brady*. The prosecution had no obligation to produce the "close-cut hair" police reports, Williams maintained, because newspaper reports had suggested that witness descriptions were not consistent with Thompson's appearance. Therefore, Williams urged, the defense already "had everything." Tr. 139. Dubelier tendered an alternative explanation for the nondisclosure. In Dubelier's view, the descriptions were not "inconsistent with [Thompson's] appearance," as portrayed in a police photograph showing Thompson's hair extending at least three inches above his forehead. *Id.*, at 171–172; Record EX73. Williams insisted that he had discharged the prosecution's duty to disclose the blood evidence by mentioning, in a motion hearing, that the prosecution intended to obtain a blood sample from Thompson. Tr. 393–394. During the armed robbery trial, Williams told one of the victims that the results of the blood test made on the swatch had been "inconclusive." *Id.*, at 962. And he testified in the §1983 action that the lab report was not *Brady* material "because I didn't know what the blood type of Mr. Thompson was." Tr. 393. But see *supra*, at 6–7, n. 5 (District Court instructed the jury that the lab report was *Brady* material).

3

Connick should have comprehended that Orleans Parish prosecutors lacked essential guidance on *Brady* and its application. In fact, Connick has effectively conceded that *Brady* training in his Office was inadequate. Tr. of Oral Arg. 60. Connick explained to the jury that prosecutors'

offices must "make . . . very clear to [new prosecutors] what their responsibility [i]s" under *Brady* and must not "giv[e] them a lot of leeway." Tr. 834–835. But the jury heard ample evidence that Connick's Office gave prosecutors no *Brady* guidance, and had installed no procedures to monitor *Brady* compliance.

In 1985, Connick acknowledged, many of his prosecutors "were coming fresh out of law school," and the Office's "[h]uge turnover" allowed attorneys with little experience to advance quickly to supervisory positions. See Tr. 853–854, 832. By 1985, Dubelier and Williams were two of the highest ranking attorneys in the Office, *id.*, at 342, 356–357, yet neither man had even five years of experience as a prosecutor, see *supra*, at 5, n. 3; Record EX746; Tr. 55, 571–576.

Dubelier and Williams learned the prosecutorial craft in Connick's Office, and, as earlier observed, see *supra*, at 17–18, their testimony manifested a woefully deficient understanding of *Brady*. Dubelier and Williams told the jury that they did not recall any *Brady* training in the Office. Tr. 170–171, 364.

Connick testified that he relied on supervisors, including Dubelier and Williams, to ensure prosecutors were familiar with their *Brady* obligations. Tr. 805–806. Yet Connick did not inquire whether the supervisors themselves understood the importance of teaching newer prosecutors about *Brady*. Riehlmann could not "recall that [he] was ever trained or instructed by anybody about [his] *Brady* obligations," on the job or otherwise. Tr. 728–729. Whittaker agreed it was possible for "inexperienced lawyers, just a few weeks out of law school with no training," to bear responsibility for "decisions on . . . whether material was *Brady* material and had to be produced." *Id.*, at 319.

Thompson's expert characterized Connick's supervision regarding *Brady* as "the blind leading the blind." Tr. 458.

For example, in 1985 trial attorneys "sometimes . . . went to Mr. Connick" with *Brady* questions, "and he would tell them" how to proceed. Tr. 892. But Connick acknowledged that he had "stopped reading law books . . . and looking at opinions" when he was first elected District Attorney in 1974. *Id.*, at 175–176.

As part of their training, prosecutors purportedly attended a pretrial conference with the Office's chief of trials before taking a case to trial. Connick intended the practice to provide both training and accountability. But it achieved neither aim in Thompson's prosecutions, for Dubelier and Williams, as senior prosecutors in the Office, were free to take cases to trial without pretrying them, and that is just how they proceeded in Thompson's prosecutions. *Id.*, at 901–902; Record 685. But cf. *ante*, at 13 ("[T]rial chiefs oversaw the preparation of the cases.").

Prosecutors confirmed that training in the District Attorney's Office, overall, was deficient. Soon after Connick retired, a survey of assistant district attorneys in the Office revealed that more than half felt that they had not received the training they needed to do their jobs. Tr. 178.

Thompson, it bears emphasis, is not complaining about the absence of formal training sessions. Tr. of Oral Arg. 55. But cf. *ante*, at 15–16. His complaint does not demand that *Brady* compliance be enforced in any particular way. He asks only that *Brady* obligations be communicated accurately and genuinely enforced.[13] Because that did not

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[13] To ward off *Brady* violations of the kind Connick conceded, for example, Connick could have communicated to Orleans Parish prosecutors, in no uncertain terms, that, "[i]f you have physical evidence that, if tested, can establish the innocence of the person who is charged, you have to turn it over." Tr. of Oral Arg. 34; *id.*, at 36 ("[I]f you have evidence that can conclusively establish to a scientific certainty the innocence of the person being charged, you have to turn it over . . . ."). Or Connick could have told prosecutors what he told the jury when he was asked whether a prosecutor must disclose a crime lab report to the defense, even if the prosecutor does not know the defendant's blood

happen in the District Attorney's Office, it was inevitable that prosecutors would misapprehend *Brady*. Had *Brady*'s importance been brought home to prosecutors, surely at least one of the four officers who knew of the swatch and lab report would have revealed their existence to defense counsel and the court.[14]

4

Louisiana did not require continuing legal education at the time of Thompson's trials. Tr. 361. But cf. *ante*, at 12–13. Primary responsibility for keeping prosecutors *au courant* with developments in the law, therefore, resided in the District Attorney's Office. Over the course of Connick's tenure as District Attorney, the jury learned, the Office's chief of appeals circulated memoranda when appellate courts issued important opinions. Tr. 751–754, 798.

The 1987 Office policy manual was a compilation of memoranda on criminal law and practice circulated to prosecutors from 1974, when Connick became District Attorney, through 1987. *Id.*, at 798. The manual contained four sentences, nothing more, on *Brady*.[15] This

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type: "Under the law it qualifies as *Brady* material. Under Louisiana law we must turn that over. Under *Brady* we must turn that over. I [failed to disclose a crime lab report] one time as a prosecutor and I got indicted by the U. S. Attorney over here for doing it." Tr. 872. But cf. *ante*, at 7 (SCALIA, J., concurring) (questioning how Connick could have been on notice of the need to train prosecutors about the *Brady* violations conceded in this case).

[14] The Court can scarcely disagree with respect to Dubelier, Williams, and Whittaker, for it acknowledges the "flagran[cy]" of Deegan's conduct, see *ante*, at 7, n. 5, and does not dispute that, pretrial, other prosecutors knew of the existence of the swatch and lab report.

[15] Section 5.25 of the manual, titled "*Brady* Material," states in full: "In most cases, in response to the request of defense attorneys, the Judge orders the State to produce so called *Brady* material—that is, information in the possession of the State which is exculpatory regarding the defendant. The duty to produce *Brady* material is ongoing and

slim instruction, the jury learned, was notably inaccurate, incomplete, and dated. Tr. 798–804, 911–918. But cf. *ante*, at 13 ("Senior attorneys also circulated court decisions and instructional memoranda to keep the prosecutors abreast of relevant legal developments."). For example, the manual did not acknowledge what *Giglio* v. *United States*, 405 U. S. 150 (1972), made plain: Impeachment evidence is *Brady* material prosecutors are obligated to disclose.[16]

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continues throughout the entirety of the trial. Failure to produce *Brady* material has resulted in mistrials and reversals, as well as extended court battles over jeopardy issues. In all cases, a review of *Brady* issues, including apparently self-serving statements made by the defendant, must be included in a pre-trial conference and each Assistant must be familiar with the law regarding exculpatory information possessed by the State." Record EX427.

[16]During the relevant time period, there were many significant developments in this Court's *Brady* jurisprudence. Among the *Brady*-related decisions this Court handed down were *United States* v. *Bagley*, 473 U. S. 667, 676 (1985) ("This Court has rejected any . . . distinction between impeachment evidence and exculpatory evidence [in the *Brady* context]."); *Weatherford* v. *Bursey*, 429 U. S. 545, 559–560 (1977) ("*Brady* is not implicated . . . where the only claim is that the State should have revealed that it would present the eyewitness testimony of a particular agent against the defendant at trial."); and *United States* v. *Agurs*, 427 U. S. 97, 103, 104, 106–107 (1976) (*Brady* claim may arise when "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury," when defense counsel makes "a pretrial request for specific evidence" and the government fails to accede to that request, and when defense counsel makes no request and the government fails to disclose "obviously exculpatory" evidence). These decisions were not referenced in the manual that compiled circulated memoranda.

In the same period, the Louisiana Supreme Court issued dozens of opinions discussing *Brady*, including *State* v. *Sylvester*, 388 So. 2d 1155, 1161 (1980) (impeachment evidence must be disclosed in response to a specific request if it would create a "reasonable doubt that did not otherwise exist"); *State* v. *Brooks*, 386 So. 2d 1348, 1351 (1980) (*Brady* extends to any material information favorable to the accused); and *State* v. *Carney*, 334 So. 2d 415, 418–419 (1976) (reversible error if

In sum, the evidence permitted the jury to reach the following conclusions. First, Connick did not ensure that prosecutors in his Office knew their *Brady* obligations; he neither confirmed their familiarity with *Brady* when he hired them, nor saw to it that training took place on his watch. Second, the need for *Brady* training and monitoring was obvious to Connick. Indeed he so testified. Third, Connick's cavalier approach to his staff's knowledge and observation of *Brady* requirements contributed to a culture of inattention to *Brady* in Orleans Parish.

As earlier noted, see *supra*, at 11, Connick resisted an effort to hold prosecutors accountable for *Brady* compliance because he felt the effort would "make [his] job more difficult." Tr. 978. He never disciplined or fired a single prosecutor for violating *Brady*. Tr. 182–183. The jury was told of this Court's decision in *Kyles* v. *Whitley*, 514 U. S. 419 (1995), a capital case prosecuted by Connick's Office that garnered attention because it featured "so many instances of the state's failure to disclose exculpatory evidence." *Id.*, at 455 (Stevens, J., concurring). When questioned about *Kyles*, Connick told the jury he was satisfied with his Office's practices and saw no need, occasioned by *Kyles*, to make any changes. Tr. 184–185. In both quantity and quality, then, the evidence canvassed here was more than sufficient to warrant a jury determination that Connick and the prosecutors who served under him were not merely negligent regarding *Brady*. Rather, they were deliberately indifferent to what the law requires.

B

In *Canton*, this Court spoke of circumstances in which the need for training may be "so obvious," and the lack of

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prosecution fails, even inadvertently, to disclose bargain with a witness).

training "so likely" to result in constitutional violations, that policymakers who do not provide for the requisite training "can reasonably be said to have been deliberately indifferent to the need" for such training. 489 U. S., at 390. This case, I am convinced, belongs in the category *Canton* marked out.

Canton offered an often-cited illustration. "[C]ity policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons." *Ibid.*, n. 10. Those policymakers, *Canton* observed, equip police officers with firearms to facilitate such arrests. *Ibid.* The need to instruct armed officers about "constitutional limitations on the use of deadly force," *Canton* said, is "'so obvious,' that failure to [train the officers] could properly be characterized as 'deliberate indifference' to constitutional rights." *Ibid.*

The District Court, tracking *Canton*'s language, instructed the jury that Thompson could prevail on his "deliberate indifference" claim only if the evidence persuaded the jury on three points. First, Connick "was certain that prosecutors would confront the situation where they would have to decide which evidence was required by the Constitution to be provided to the accused." Tr. 1099. Second, "the situation involved a difficult choice[,] or one that prosecutors had a history of mishandling, such that additional training, supervision or monitoring was clearly needed." *Ibid.* Third, "the wrong choice by a prosecutor in that situation would frequently cause a deprivation of an accused's constitutional rights." *Ibid.*; Record 1619–1620; see *Canton*, 489 U. S., at 390, and n. 10; *Walker* v. *New York*, 974 F. 2d 293, 297–298 (CA2 1992).[17]

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[17] JUSTICE SCALIA contends that this "theory of deliberate indifference would repeal the law of *Monell*," and creates a danger that "'failure to train' would become a talismanic incantation producing municipal

Petitioners used this formulation of the failure to train standard in pretrial and post-trial submissions, Record 1256–1257, 1662, and in their own proposed jury instruction on deliberate indifference.[18] Nor do petitioners dis-

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liability [i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee." *Ante*, at 2–3 (some internal quotation marks omitted). The District Court's charge, however, cautiously cabined the jury's assessment of Connick's deliberate indifference. See, *e.g.*, Tr. 1100 ("Mr. Thompson must prove that more likely than not the *Brady* material would have been produced if the prosecutors involved in his underlying criminal cases had been properly trained, supervised or monitored regarding the production of *Brady* evidence."). See also *id.*, at 1096–1097, 1099–1100.

The deliberate indifference jury instruction in this case was based on the Second Circuit's opinion in *Walker* v. *New York*, 974 F. 2d 293, 297–298 (1992), applying *Canton* to a §1983 complaint alleging that a district attorney failed to train prosecutors about *Brady*. JUSTICE SCALIA's fears should be calmed by post-*Walker* experience in the Second Circuit. There has been no "litigation flood or even rainfall," *Skinner* v. *Switzer*, 562 U. S. ___ (2011) (slip op., at 12), in that Circuit in *Walker*'s wake. See Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 39 ("Tellingly, in the Second Circuit, in the nearly 20 years since the court decided *Walker*, there have been no successful lawsuits for non-*Brady* constitutional violations committed by prosecutors at trial (and no reported 'single violation' *Brady* case)." (citation omitted)); Brief for Center on the Administration of Criminal Law, New York University School of Law, et al. as *Amici Curiae* 35–36 (*Walker* has prompted "no flood of §1983 liability").

[18]The instruction Connick proposed resembled the charge given by the District Court. See *supra*, at 24. Connick's proposed instruction read: "Before a district attorney's failure to train or supervise constitutes deliberate indifference to the constitutional rights of citizens: (1) the plaintiff must show that Harry Connick knew 'to a moral certainty' that his employees will confront a given situation; (2) the plaintiff must show that the situation either presents the employee with a difficult choice . . . such that training or supervision will make the choice less difficult or that there is a history of employees mishandling the situation; and (3) the plaintiff must show that the wrong choice by the assistant district attorney will frequently cause the deprivation of a citizen's constitutional rights." Record 992 (citing *Canton*, 489 U. S., at 390; punctuation altered). But cf. *ante*, at 3 (SCALIA, J., concurring) (criticizing "Thompson's theory" of deliberate indifference).

pute that Connick "kn[e]w to a moral certainty that" his prosecutors would regularly face *Brady* decisions. See *Canton*, 489 U. S., at 390, n. 10.

The jury, furthermore, could reasonably find that *Brady* rights may involve choices so difficult that Connick obviously knew or should have known prosecutors needed more than perfunctory training to make the correct choices. See *Canton*, 489 U. S., at 390, and n. 10.[19] As demonstrated earlier, see *supra*, at 16–18, even at trial prosecutors failed to give an accurate account of their *Brady* obligations. And, again as emphasized earlier, see *supra*, at 18–20, the evidence permitted the jury to conclude that Connick should have known *Brady* training in his office bordered on "zero." See Tr. of Oral Arg. 41. Moreover, Connick understood that newer prosecutors needed "very clear" guidance and should not be left to grapple with *Brady* on their own. Tr. 834–835. It was thus "obvious" to him, the jury could find, that constitutional rights would be in jeopardy if prosecutors received slim to no *Brady* training.

Based on the evidence presented, the jury could conclude that *Brady* errors by untrained prosecutors would frequently cause deprivations of defendants' constitutional rights. The jury learned of several *Brady* oversights in

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Petitioners, it is true, argued all along that "[t]o prove deliberate indifference, Thompson had to demonstrate a pattern of violations," Brief for Appellants in No. 07–30443 (CA5), p. 41; see *ante*, at 3–4 (SCALIA, J., concurring), but the court rejected their categorical position. Petitioners did not otherwise assail the District Court's formulation of the deliberate indifference instruction. *E.g.*, Record 1662.

[19] Courts have noted the often trying nature of a prosecutor's *Brady* obligation. See, *e.g.*, *State* v. *Whitlock*, 454 So. 2d 871, 874 (La. App. 1984) (recognizing, in a case involving *Brady* issues in Connick's Office, that "it is usually most difficult to determine whether or not inconsistencies or omitted information in witnesses' statements are material to the defendant's guilt" (quoting *State* v. *Davenport*, 399 So. 2d 201, 204 (La. 1981))).

Thompson's trials and heard testimony that Connick's Office had one of the worst *Brady* records in the country. Tr. 163. Because prosecutors faced considerable pressure to get convictions, *id.*, at 317, 341, and were instructed to "turn over what was required by state and federal law, but no more," Brief for Petitioners 6–7, the risk was all too real that they would err by withholding rather than revealing information favorable to the defense.

In sum, despite JUSTICE SCALIA's protestations to the contrary, *ante*, at 1, 5, the *Brady* violations in Thompson's prosecutions were not singular and they were not aberrational. They were just what one would expect given the attitude toward *Brady* pervasive in the District Attorney's Office. Thompson demonstrated that no fewer than five prosecutors—the four trial prosecutors and Riehlmann—disregarded his *Brady* rights. He established that they kept from him, year upon year, evidence vital to his defense. Their conduct, he showed with equal force, was a foreseeable consequence of lax training in, and absence of monitoring of, a legal requirement fundamental to a fair trial.[20]

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[20]The jury could draw a direct, causal connection between Connick's deliberate indifference, prosecutors' misapprehension of *Brady*, and the *Brady* violations in Thompson's case. See, *e.g.*, *supra*, at 17 (prosecutors' misunderstandings of *Brady* "were in large part responsible for the gross disregard of *Brady* rights Thompson experienced"); *supra*, at 18 ("The jury could attribute the violations of Thompson's rights directly to prosecutors' misapprehension of *Brady*."); *supra*, at 17–18 (Williams did not believe *Brady* required disclosure of impeachment evidence and did not believe he had any obligation to turn over the impeaching "close-cut hair" police reports); *supra*, at 18 (At the time of the armed robbery trial, Williams reported that the results of the blood test on the swatch were "inconclusive"); *ibid.* ("[Williams] testified . . . that the lab report was not *Brady* material . . . ."); *supra*, at 19–20 (Dubelier and Williams, the lead prosecutors in Thompson's trials, "learned the prosecutorial craft in Connick's Office," "did not recall any *Brady* training," demonstrated "a woefully deficient understanding of *Brady*," and received no supervision during Thompson's trials); *supra*, at 21 ("Had *Brady*'s

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Unquestionably, a municipality that leaves police officers untrained in constitutional limits on the use of deadly weapons places lives in jeopardy. *Canton*, 489 U. S., at 390, n. 10. But as this case so vividly shows, a municipality that empowers prosecutors to press for a death sentence without ensuring that those prosecutors know and honor *Brady* rights may be no less "deliberately indiffer-

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importance been brought home to prosecutors, surely at least one of the four officers who knew of the swatch and lab report would have revealed their existence to defense counsel and the court."); *supra*, at 23 (Connick did not want to hold prosecutors accountable for *Brady* compliance because he felt that doing so would make his job more difficult); *supra*, at 23 (Connick never disciplined a single prosecutor for violating *Brady*); *supra*, at 27 ("Because prosecutors faced considerable pressure to get convictions, and were instructed to turn over what was required by state and federal law, but no more, the risk was all too real that they would err by withholding rather than revealing information favorable to the defense." (citations and internal quotation marks omitted)). But cf. *ante*, at 7, n. 5 ("The dissent believes that evidence that the prosecutors allegedly 'misapprehen[ded]' *Brady* proves causation.").

I note, furthermore, that the jury received clear instructions on the causation element, and neither Connick nor the majority disputes the accuracy or adequacy of the instruction that, to prevail, Thompson must prove "that more likely than not the *Brady* material would have been produced if the prosecutors involved in his underlying criminal cases had been properly trained, supervised or monitored regarding the production of *Brady* evidence." Tr. 1100.

The jury was properly instructed that "[f]or liability to attach because of a failure to train, the fault must be in the training program itself, not in any particular prosecutor." *Id.*, at 1098. Under that instruction, in finding Connick liable, the jury necessarily rejected the argument—echoed by JUSTICE SCALIA—that Deegan "was the only bad guy." *Id.*, at 1074. See also *id.*, at 1057; *ante*, at 5. If indeed Thompson had shown simply and only that Deegan deliberately withheld evidence, I would agree that there would be no basis for liability. But, as reams of evidence showed, disregard of *Brady* occurred, over and over again in Orleans Parish, before, during, and after Thompson's 1985 robbery and murder trials.

ent" to the risk to innocent lives.

Brady, this Court has long recognized, is among the most basic safeguards brigading a criminal defendant's fair trial right. See *Cone* v. *Bell*, 556 U. S. ___, ___ (2009) (slip op., at 1). See also *United States* v. *Bagley*, 473 U. S. 667, 695 (1985) (Marshall, J., dissenting). Vigilance in superintending prosecutors' attention to *Brady*'s requirement is all the more important for this reason: A *Brady* violation, by its nature, causes suppression of evidence beyond the defendant's capacity to ferret out. Because the absence of the withheld evidence may result in the conviction of an innocent defendant, it is unconscionable not to impose reasonable controls impelling prosecutors to bring the information to light.

The Court nevertheless holds *Canton*'s example inapposite. It maintains that professional obligations, ethics rules, and training—including on-the-job training—set attorneys apart from other municipal employees, including rookie police officers. *Ante*, at 12–15. Connick "had every incentive at trial to attempt to establish" that he could reasonably rely on the professional education and status of his staff. Cf. *ante*, at 10, n. 6. But the jury heard and rejected his argument to that effect. Tr. 364, 576–577, 834–835.

The Court advances Connick's argument with greater clarity, but with no greater support. On what basis can one be confident that law schools acquaint students with prosecutors' unique obligation under *Brady*? Whittaker told the jury he did not recall covering *Brady* in his criminal procedure class in law school. Tr. 335. Dubelier's *alma mater*, like most other law faculties, does not make criminal procedure a required course.[21]

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[21] See Tulane University Law School, Curriculum, http://www.law.tulane.edu (select "Academics"; select "Curriculum") (as visited Mar. 21, 2011, and in Clerk of Court's case file).

Connick suggested that the bar examination ensures that new attorneys will know what *Brady* demands. Tr. 835. Research indicates, however, that from 1980 to the present, *Brady* questions have not accounted for even 10% of the total points in the criminal law and procedure section of any administration of the Louisiana Bar Examination.[22] A person sitting for the Louisiana Bar Examination, moreover, need pass only five of the exam's nine sections.[23] One can qualify for admission to the profession with no showing of even passing knowledge of criminal law and procedure.

The majority's suggestion that lawyers do not need *Brady* training because they "are equipped with the tools to find, interpret, and apply legal principles," *ante*, at 17–18, "blinks reality" and is belied by the facts of this case. See Brief for Former Federal Civil Rights Officials and Prosecutors as *Amici Curiae* 13. Connick himself recognized that his prosecutors, because of their inexperience, were not so equipped. Indeed, "understanding and complying with *Brady* obligations are not easy tasks, and the appropriate way to resolve *Brady* issues is not always self-evident." Brief for Former Federal Civil Rights Officials and Prosecutors as *Amici Curiae* 6. "*Brady* compliance," therefore, "is too much at risk, and too fundamental to the fairness of our criminal justice system, to be taken for granted," and "training remains critical." *Id.*, at 3, 7.

The majority further suggests that a prior pattern of similar violations is necessary to show deliberate indifference to defendants' *Brady* rights. See *ante*, at 5–6, and n. 4, 11–12.[24] The text of §1983 contains no such limita-

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[22] See Supreme Court of Louisiana, Committee on Bar Admissions, Compilation of Louisiana State Bar Examinations, Feb. 1980 through July 2010 (available in Clerk of Court's case file).

[23] See La. State Bar Assn., Articles of Incorporation, Art. 14, §10(A), La. Rev. Stat. Ann. §37, ch. 4, App. (West 1974); *ibid.* (West 1988).

[24] *Board of Comm'rs of Bryan Cty.* v. *Brown*, 520 U. S. 397 (1997),

tion.[25] Nor is there any reason to imply such a limitation.[26] A district attorney's deliberate indifference might be shown in several ways short of a prior pattern.[27] This

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reaffirmed "that evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability." *Id.*, at 409. Conducting this inquiry, the Court has acknowledged, "may not be an easy task for the factfinder." *Canton* v. *Harris*, 489 U. S. 378, 391 (1989). *Bryan County* did not retreat from this Court's conclusion in *Canton* that "judge and jury, doing their respective jobs, will be adequate to the task." 489 U. S., at 391. See also *Bryan County*, 520 U. S., at 410 (absent a pattern, municipal liability may be predicated on "a particular glaring omission in a training regimen"). But cf. *ante*, at 16–18 (suggesting that under no set of facts could a plaintiff establish deliberate indifference for failure to train prosecutors in their *Brady* obligation without showing a prior pattern of violations).

[25] When Congress sought to render a claim for relief contingent on showing a pattern or practice, it did so expressly. See, *e.g.*, 42 U. S. C. §14141(a) ("It shall be unlawful for any governmental authority . . . to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights . . . protected by the Constitution . . . ."); 15 U. S. C. §6104(a) ("Any person adversely affected by any pattern or practice of telemarketing . . . may . . . bring a civil action . . . ."); 49 U. S. C. §306(e) (authorizing the Attorney General to bring a civil action when he "has reason to believe that a person is engaged in a pattern or practice [of] violating this section"). See also 47 U. S. C. §532(e)(2)–(3) (authorizing the Federal Communications Commission to establish additional rules when "the Commission finds that the prior adjudicated violations of this section constitute a pattern or practice of violations").

[26] In the end, the majority leaves open the possibility that something other than "a pattern of violations" could also give a district attorney "specific reason" to know that additional training is necessary. See *ante*, at 14–15. Connick, by his own admission, had such a reason. See *supra*, at 18–20.

[27] For example, a prosecutor's office could be deliberately indifferent if it had a longstanding open-file policy, abandoned that policy, but failed to provide training to show prosecutors how to comply with their *Brady* obligations in the altered circumstances. Or a district attorney could be deliberately indifferent if he had a practice of paring well-trained prosecutors with untrained prosecutors, knew that such supervision

case is one such instance. Connick, who himself had been indicted for suppression of evidence, created a tinderbox in Orleans Parish in which *Brady* violations were nigh inevitable. And when they did occur, Connick insisted there was no need to change anything, and opposed efforts to hold prosecutors accountable on the ground that doing so would make his job more difficult.

A District Attorney aware of his office's high turnover rate, who recruits prosecutors fresh out of law school and promotes them rapidly through the ranks, bears responsibility for ensuring that on-the-job training takes place. In short, the buck stops with him.[28] As the Court recognizes, "the duty to produce *Brady* evidence to the defense" is "[a]mong prosecutors' unique ethical obligations." *Ante*, at 13. The evidence in this case presents overwhelming support for the conclusion that the Orleans Parish Office slighted its responsibility to the profession and to the State's system of justice by providing no on-the-job *Brady* training. Connick was not "entitled to rely on prosecutors' professional training," *ante*, at 14, for Connick himself should have been the principal insurer of that training.

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For the reasons stated, I would affirm the judgment of the U. S. Court of Appeals for the Fifth Circuit. Like that court and, before it, the District Court, I would uphold the

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had stopped untrained prosecutors from committing *Brady* violations, but nevertheless changed the staffing on cases so that untrained prosecutors worked without supervision.

[28] If the majority reads this statement as an endorsement of *respondeat superior* liability, *ante*, at 18, n. 12, then it entirely "misses [my] point," cf. *ante*, at 17. *Canton* recognized that deliberate indifference liability and *respondeat superior* liability are not one and the same. 489 U. S., at 385, 388–389. Connick was directly responsible for the *Brady* violations in Thompson's prosecutions not because he hired prosecutors who violated *Brady*, but because of his own deliberate indifference.

jury's verdict awarding damages to Thompson for the gross, deliberately indifferent, and long-continuing violation of his fair trial right.

Prosecutorial Ethics: The Charging Decision

By Hans P. Sinha

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Editor's Note: The third edition of NDAA's National Prosecution Standards will be published in 2008. Other resources on this topic are the National Center for Prosecution Ethics and its publication, Doing Justuce: A Prosecutor's Guide to Ethics and Civil Liability. The center is a project of the National College of District Attorneys, the education division of NDAA. VIsit the NDAA Web site, www.ndaa.org, for more information.

This article is the first in a series that will examine the ethical rules and professional standards applicable to prosecutors. The article begins with an in-depth examination of the history and development of Rule 3.8 of the Model Rules of Professional Conduct—"The Special Responsibilities of a Prosecutor," and specifically subsection (a) dealing with the charging duties of a prosecutor. This examination will include a look at the rule itself, a comparison of state variations of the rule, as well as the aspirational standards promulgated by the American Bar Association and the National District Attorneys Association. Successive articles will provide an overview of the remaining subsections of Rule 3.8, as well as some of the other rules a prosecutor most often encounters. The series of articles will end with a discussion of an inextricably intertwined issue—that of prosecutorial immunity. The goal of the articles is not to pontificate as to what should be, but rather to provide an overview of what is, all in the hope that the better informed prosecutors are, the better they can exercise their powers as both an advocate and a minister of justice, and the less likely they will find themselves on the short end of an ethical complaint.

Introduction

The American prosecutor, local, state or federal, wields enormous power. As Justice Jackson noted in his often quoted speech to federal prosecutors in 1940:

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret sessions, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives. he is one of the worst.1

motives, he is one of the worst.1

By far the primary source for this power comes from the prosecutor's unbridled discretion to initiate prosecutions. The prosecutor, and the prosecutor alone, as Justice Jackson noted, decides whether to bring charges, whom to charge, and what those charges should be. While there are certain checks built into the system to temper this discretion, the grand jury being one of them, the reality is that if a prosecutor wants to bring charges against someone, the prosecutor will be able to do so. Prosecutors' discretion carries through the entire prosecution in terms of deciding the overall strategy of the prosecution. They direct the prosecution. Again, while certain checks on their discretion do exist by way of the judge, the defense and the victim, an experienced prosecutor can in all reality sit down at the onset of a typical case and fairly accurately plan and predict the outcome of the case. In doing so a prosecutor will primarily draw upon his experiential knowledge of the system as a whole—how the facts fit the law, how the defense will react, how the judge will rule on disputed issues, and how the case will ultimately play out before the fact-finder. While no case outcome can be predicted with certainty, it is the prosecutors' experience that provides them with the knowledge to successfully shepherd the case through the labyrinth of the criminal justice system. It is, however, their discretion that enables them to apply this experience in the way they determine best fits the case.

Any time an official is given wide latitude to wield power, there exists the possibility of an abuse of such power. This is especially so if there are no standards to rein in or guide the official in the use of such discretion. Indeed, as the Supreme Court has noted, discretion without standards "encourages an arbitrary and discriminatory enforcement of the law."2 Prosecutors, however, do have standards and rules to guide their discretion and their behavior in general. All prosecutors are bound by their jurisdictions' Rules of Professional Conduct—mandatory rules which, if violated, can lead to disciplinary proceedings being initiated against the prosecutor. In addition, the American Bar Association and the National District Attorneys Association have promulgated aspirational prosecution standards to further guide prosecutors in their quest to act ethically and professionally. Similarly, the Department of Justice has promulgated extensive guidelines for federal prosecutors. A thorough knowledge of these rules and standards is desirable for every prosecutor. Not only does a familiarity with these rules help the prosecutor better wield his powers in an effective and just way, but, in a time when ethical complaints are increasingly filed against prosecutors, an intimate familiarity with the mandatory Rules of Professional Conduct is a self-preserving necessity for all prosecutors.

All the rules in the world, however, cannot an ethical person make. As with all professions, when all is said and done, it is the prosecutor's innate sense of what is right and wrong that will ultimately guide him in his quest to not only be an effective advocate but also a minister of justice. As Justice Jackson noted in concluding his remarks:

The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.3

History and Development of Professional Rules of Conduct

There can be little doubt that, as a whole, prosecutors set the standard for ethics and professionalism in court. If they do not, they should. Prosecutors must strive for the highest possible ethical and professional standard in everything they do. If they fail to do so, the overall ethical and professional level in their jurisdiction will invariably deteriorate. The judiciary, the defense bar, and the public, look toward the prosecution to set the standard. If prosecutors are seen as cutting corners, ethically or professionally, the eventual outcome will be that others will cut even bigger corners, and a race to the proverbial bottom will have begun—a race the defense will invariably not only win, but also benefit from the most.

Ideally, all prosecutors possess that innate sense of right and wrong that Justice Jackson alluded to in 1940. Knowing, however, that this is not always the case, and realizing that even when it is the case, further guidance is desirable, rules delineating what constitutes professional and ethical conduct, have been formulated. Interestingly, these rules, termed Rules of Professional Conduct in most jurisdictions, arguably are misnamed. They really provide guidelines as to what is ethical, the minimum level of standards that a prosecutor must adhere to, or when phrased in the negative, what he cannot do. The rules, in other words, provide the prosecutor with ethical benchmarks. They do not, contrary to their "professional" nomenclature, provide professional guidance per se.

One way to help define professionalism and ethics is by looking towards the history and development of these concepts in relation to the legal profession as a whole and prosecutors in particular. The term profession comes from the Latin term professionem, meaning to make a public declaration.4 Perhaps the most commonly cited definition of the legal profession is Dean Roscoe Pound's statement that "[t]he term refers to a group of men pursuing a learned art as a common calling in the spirit of public service—no less public service because it may incidentally be a means of a livelihood. Pursuit of the learned art in the spirit of public service is the primary purpose."5

While Dean Pound's statement is true for all lawyers, his last sentence—"[p]ursuit of the learned in the spirit of public service"—particularly speaks to prosecutors. Other lawyers may engage in pro bono representation now and then; prosecutors do nothing but public service. They are in a real way the true public defenders. Considering the special place of prosecutors in our society, it is not surprising that the first code regulating the ethical and professional conduct of lawyers in America, the 1887 Alabama Code of Ethics, had a rule specifically for prosecutors. And, considering the crucial importance of the charging decision of a prosecutor's duties, it is likewise not surprising that this rule spoke directly to the prosecutor's charging duties. This notion of drafting rules specially for prosecutors has survived to this day, including special references to what prosecutors may, should and must do and consider when exercising their discretionary power in making charging decisions.

Ethical and Professional Rules Pertaining to Charging

In 1881, during the Alabama State Bar Association meeting in Mobile, Alabama, Thomas Goode Jones, then chairman of the Alabama State Bar Association Committee on Judicial Administration and Remedial Procedure and a future governor of Alabama and United States District Court judge, issued a call for the creation of a state code on ethics.6 The Alabama State Bar Association heeded Jones's call, and on December 14, 1887, adopted the nation's first code of ethics for lawyers. The preamble to the 1887 Alabama

Code included a quote from George Sharswood, Pennsylvania Supreme Court Chief Justice and University of Pennsylvania Law Professor, noting that "[t]here is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the lines of strict integrity[,]" and emphasizing that in navigating the "pitfalls and mantraps at every step," the lawyer's "[h]igh moral principle is his only safe guide; the only torch to light his way amidst darkness and obstruction."7

The Alabama Code consisted of 57 "general rules" adopted in order to provide guidance for the members of the Alabama State Bar Association.8 One rule spoke directly to the duties of prosecutors. Significantly, this rule addressed a prosecutor's charging power by delineating when a prosecutor was permitted to proceed with a prosecution. Rule 12 of the 1887 Alabama Code of Ethics stated:

An attorney appearing or continuing as private counsel in the prosecution for a crime of which he believes the accused innocent, for-swears himself. The State's attorney is criminal, if he presses for a conviction, when upon the evidence he believes the prisoner innocent. If the evidence is not plain enough to justify a nolle pros., a public prosecutor should submit the case, with such comments as are pertinent, accompanied by a candid statement of his own doubt.9

The Alabama Code made it clear that a prosecutor could not prosecute a case if, based upon the evidence, the prosecutor believed the accused to be innocent. This bedrock principle has not changed. In fact, this and other similarities between the 1887 Alabama Code and the American Bar Association's 1908 canons are not accidental. After Alabama adopted its code of ethics in 1887 and ten other states quickly followed suit, the ABA saw the need for a general code of ethics that jurisdictions across the land could emulate. Jones, the driving force behind the Alabama Code was invited to serve on the ABA committee charged with drafting such a code.10 Consequently it is not surprising that Canon 5 of the 1908 Canons of Professional Ethics adopted by the American Bar Association at its 31st annual meeting in 1908 spoke to the role of the prosecutor, albeit in a more general way. Canon 5—The Defense or Prosecution of Those Accused of Crime, emphasized the prosecutor's overriding goal of ensuring that justice is done, stating that:

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.11

The Model Code of Professional Responsibility, adopted by the ABA in 1969 brought the emphasis back towards specifics, including two paragraphs in DR 7-103—Performing the Duty of Public Prosecutor or Other Government Lawyer. The second paragraph dealt with the disclosure of exculpatory evidence, now encapsulated in Model Rule 3.8(d) (to be discussed in a subsequent article), while the first paragraph specifically addressed the prosecutor's charging duties. DR 7-103(A) mandated that:

A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.12

Although the Model Code quickly became the standard across the nation, most states eventually adopted the Model Rule version after they were

promulgated by the ABA in 1983. Today only three states still use the DR 7-103 language, or substantially similar language, for their rule articulating the special responsibilities of a prosecutor. The vast majority of states have adopted the language of Rule 3.8 of the Model Rules as a means to both provide guidance to prosecutors and to act as a sword to punish prosecutors who stray from accepted norms. Significantly, the rule begins by addressing the prosecutor's charging duties.

Model Rule 3.8(a)—Standard to Charge a Criminal Prosecution

Model Rule 3.8(a) is brief and to the point. It succinctly mandates that:

The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.13

A large majority of jurisdictions (41 states) have adopted the Model Rule's 3.8(a) language verbatim.14 The remaining ten jurisdictions (including the District of Columbia) maintain the Model Rule's probable cause level as the ethical minimum standard for a prosecutor to institute a criminal charge. When there are distinctions amongst the different rules, they generally arise in terms of how a particular jurisdiction words its "refrain from" imperative and how it qualifies the "knows" element. While these differences are not unimportant as a whole, the 51 variations of subsection (a) of Rule 3.8 provide more similarities than differences. The one common ground is that a prosecutor simply cannot bring forth, or maintain, charges knowing that probable cause is lacking.

Rule 3.8(a)—"Refrain from prosecuting..."

Before formal charges have been instituted by the prosecutor or submitted to the grand jury for consideration, Rule 3.8(a) simply dictates that the prosecutor refuse the charge if sufficient evidence is lacking to meet the probable cause standard enunciated in Rule 3.8(a). The prosecutor's discretion, always great, is at its greatest when he is making the initial decision as to what charges to bring. If the case is lacking in probable cause, he cannot prosecute. If additional evidence is subsequently found, the charges can always (assuming that the statute of limitations has not run) be brought at a later time.

In practical terms, however, the more difficult situation arises after a prosecutor has instituted charges. At this point, the advocate role of the prosecutor may have set in. The prosecutor may have lived with the case for some time, has gotten to know the victims, worked with the witnesses—in short, become an advocate for the case. The case is no longer a mere possible prosecution viewed at a distance; it is a case in which the prosecutor has invested his time, effort and emotion. Regardless, the prosecutor is ethically and professional bound to set aside any notions of "if I could just get it before a jury..." and, if probable cause no longer exists, "refrain from prosecuting" the case, which in all practicality means entering a nolle prosequi. (The issue of accepting a plea under such circumstances is discussed in a subsequent article.)

While the Model Rule does not make this distinction between the inception and the post-indictment stage of the case clear, some of the states have tweaked the Model Rule language to emphasize the ongoing nature of this prohibition. Ohio, for example, mandates that a prosecutor may not "pursue or prosecute a charge that the prosecutor knows is not supported by probable cause,"15 while Virginia makes it clear that a prosecutor may not "file or maintain a charge that the prosecutor knows is not supported by probable cause."16